(12)

Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

No. 96-6298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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CASILLAS PRESS — 1717 K STREET NW WASHINGTON DC 20036 — 202-223-1220

28 pp

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QUESTION PRESENTED

Did the court of appeals correctly conclude that Congress, despite an explicit provision in Section 107(c) of the Antiterrorism and Effective Death Penalty Act, failed to specify the extent to which the statute's habeas corpus revisions are to apply retroactively to pending habeas cases, and, if so, did the court correctly interpret this Court's retroactivity jurisprudence to depend on proof of actual reliance interests and to create the presumption that habeas-curtailing statutes apply retroactively?

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BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Washington Legal Foundation respectfully submits this brief amicus curiae in support of respondent. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C. WLF participates in litigation and administrative

proceedings affecting the broad public interest, and has a particular interest and expertise in criminal justice reform, the death penalty, and crime victims' rights. In that regard, WLF has appeared as amicus curiae in numerous cases before this Court. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Davis v. United States*, 114 S.Ct. 2350 (1994); *Felker v. Turpin*, 116 S.Ct. 2333 (1996).

WLF believes its perspective will complement the brief of respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

Like *Felker v. Turpin*, 116 S.Ct. 2333 (1996), this case provides the Court with an opportunity to address issues arising under the federal habeas corpus reforms contained in the Antiterrorism and Effective Death Penalty Act of 1996. Also like *Felker*, the present case—even when limited by this Court's order granting *certiorari* to the single issue of retroactivity—may require the Court to consider and resolve fundamental questions about the purpose of the new statute, the model of federal habeas on which it is based, and the constitutional validity of some of the important changes it implements. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 338-39 (7th ed. 1993) (discussing when "subsidiary question[s]" are "fairly included" in the question presented, within the meaning of SUP. CT. R. 14.1(a)). We will address these fundamental questions first, and then turn to the specific issue on which the Court has granted review in this case.

The new statute, and the model of federal habeas on which it is founded, are wholly consistent with the Constitution and with our society's continuing commitment to even-handed justice and procedural fairness in criminal proceedings. The federal statutory writ of habeas corpus for state prisoners, first authorized by

Congress in the Act of 1867, is largely a matter of legislative grace. Although the core of the statutory writ may have acquired limited constitutional status (under the Suspension Clause or the Due Process Clause) as a result of expansive modern conceptions of due process, the 1996 Act preserves the writ's ability to fulfill the statutory writ's two core purposes: protecting innocent persons and deterring egregious or bad-faith misconduct by state courts. The 1996 Act thus comports with the Constitution and can be constitutionally applied to all habeas cases—including pending ones—if that is the result reached under the retroactivity analysis laid out by this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

The *Landgraf* analysis requires that we look first to expressed Congressional intent and then to certain canons of statutory construction, in deciding whether or not a new statute should be applied to conduct that preceded the statute's enactment. Because Congress did not speak clearly on the question of whether the challenged portion of the 1996 Act, amending 28 U.S.C. § 2254(d), applies to pending habeas cases, the Court must proceed to the second part of the *Landgraf* analysis to determine whether such application would be genuinely "retroactive" in effect (and hence presumptively improper) or not (and hence presumptively allowed). The challenged portion of the 1996 Act does not impair any "vested rights" held by state prisoners like Lindh prior to the Act's effective date of April 24, 1996, but merely serves to reallocate decision-making authority in the enforcement of those rights between the state and the lower federal courts, much like a jurisdictional statute in a unitary court system might do. The application of amended 28 U.S.C. § 2254(d) to state prisoners whose criminal convictions became final prior to the Act's effective date—and even to those who, like Lindh, filed their federal habeas petitions before that date—thus should not be seen as "retroactive" in effect. Rather, under this Court's analysis in *Landgraf*, such application flows naturally from the premise that a court should "apply the law in

effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Landgraf*, 114 S.Ct., at 1486 (citing *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

Finally, we express no view on the question whether, if the Court concludes that the challenged statutory provision generally applies to most pending habeas cases, the Court should examine possible reliance interests of persons similarly situated to Lindh, in order to determine whether he may belong to a narrow category of habeas petitioners that should be exempted on fact-specific grounds from the general rule of statutory applicability.

ARGUMENT

I. THE AVAILABILITY OF FEDERAL HABEAS CORPUS AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS IN A STATE CRIMINAL CASE IS LARGELY A MATTER OF LEGISLATIVE GRACE, AND CONGRESS MAY REDUCE THE SCOPE OF FEDERAL HABEAS WITHOUT RUNNING AFOUL OF THE CONSTITUTION.

This case involves only one legal issue—whether a single provision of the Antiterrorism And Effective Death Penalty Act of 1996, amending 28 U.S.C. § 2254(d), applies to pending federal habeas corpus petitions. Much of the rhetoric surrounding this issue, however, can be traced to the view of some that federal habeas itself has become a "vested right" of state prisoners. We therefore begin by addressing that view.

Although events of the past three-and-a-half decades have perhaps misled us into believing otherwise, state prisoners incarcerated under judgments of criminal conviction enjoy no constitutionally-based right to plenary review of their federal

constitutional claims in a federal forum. Instead, state prisoners historically have enjoyed— and continue to enjoy today— (1) the right, unchanged by the 1996 Act, to petition this Court for a writ of *certiorari* to review the judgment of the state courts on direct appeal, *see Felker v. Turpin*, 116 S.Ct. 2333 (1996), and (2) a limited opportunity, first conferred upon state prisoners by Congress in the Habeas Corpus Act of 1867 and later subjected to numerous legislative and judicial modifications, to seek issuance of a statutory writ of federal habeas corpus. Closer examination of the evolution of federal habeas for state prisoners reveals the extent to which Congress remains free to reduce the scope of the statutory remedy.

A. Federal Habeas Corpus Was Unavailable to Most State Prisoners Until the Habeas Corpus Act of 1867, and Modern Changes in the Scope of the Statutory Writ Have Occurred With the Expressed Intent or the Subsequent Tacit Consent of Congress.

The Great Writ of the Magna Carta and the English common law, which serves as a bastion against executive detention without judicial process, is numbered among our most cherished legal rights and enjoys the full protection of the Constitution. *See* U.S. CONST., Art. I, § 9, Cl. 2 (Suspension Clause). The same cannot be said of the statutory version of the writ that is the subject of the instant case. As the Court noted just last year in *Felker*, until 1867, federal habeas was largely unavailable as a remedy for state prisoners alleging constitutional violations in their state criminal cases. The Judiciary Act of 1789, which authorized federal courts to issue "writs of . . . habeas corpus," specifically prohibited use of the writ to inquire into the incarceration of "prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In fact, until 1867, a federal court could issue a writ of habeas corpus to produce a

state prisoner only if the prisoner (1) was needed to testify in federal court; (2) was imprisoned by the state for an act done in pursuance of a federal law; or (3) was a "subjec[t] or citize[n] of a foreign State, and domiciled therein." *See Felker*, 116 S.Ct., at 2338 (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634-635; and Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540).

Long after Congress enacted the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, making federal habeas available for the first time to most state prisoners, the statutory writ—like its common-law ancestor—was still largely limited to rare cases involving jurisdictional defects in the state courts or egregious violations of due process that came to be viewed as the functional equivalent of a jurisdictional defect. *See, e.g., Waley v. Johnson*, 316 U.S. 101 (1942); *Frank v. Mangum*, 237 U.S. 309 (1915); *see generally* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966), describing the common-law writ ("[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.").

During the 1950s and 1960s, for reasons similar to those that originally led Congress to enact the Act of 1867, this Court took a leading role in redefining and expanding the scope of the federal habeas remedy for state prisoners. This expansion of federal habeas was necessary because, at the same time, the Court was engaged in the controversial process of developing important new federal constitutional rights in the area of criminal procedure. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966). These developments, like some of the legislation enacted by the Reconstruction Congress, provoked hostility and resistance in at

least some state courts, who viewed these new constitutional rules as if they were "invasions" by a "foreign enemy." *See generally* Joseph L. Hoffmann and William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 77-80 (1994). Federal habeas thus served as a crucial weapon in a short-lived battle for supremacy between this Court's new constitutional criminal procedure doctrines and pre-existing bodies of state criminal procedure law—a battle that ended more than a decade ago with the nearly complete displacement of state criminal procedure law by federal constitutional rules of criminal procedure. *See id.* at 80-85.

Importantly, however, even as this Court has acknowledged its own "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged," *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977), the primacy of Congress in defining the proper scope of the statutory writ has always remained clear. So, for example, shortly after the famous 1963 trilogy of Supreme Court habeas decisions, *see Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963), Congress enacted amendments to the habeas statute that were designed to codify in large part, while modifying in certain respects, the new habeas rules announced by the Court in those cases. *See* Act of Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105. Although there has been some disagreement over the meaning of these amendments, *compare, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (O'Connor, J., dissenting), *with Wainwright v. Sykes*, 433 U.S. 72, 99, 106 n.7 (1977) (Brennan, J., dissenting), no Member of this Court has ever disputed Congress's authority—subject only to limited constitutional restrictions—either to ratify or to reject the Court's evolving interpretations of the federal habeas statute.

The Antiterrorism and Effective Death Penalty Act of 1996 represents the first major attempt by Congress in more than a

hundred years to reassert its control over the development of the statutory habeas writ. Congress surely possesses the authority to do so, as long as that authority is exercised within constitutional boundaries. In the next section, we address the constitutional limits on Congress's ability to alter the scope of the federal habeas remedy for state prisoners.

B. Although the Statutory Writ's Vital Role in Fulfilling its Two Core Purposes—Protecting Innocent Persons and Deterring Egregious or Bad-Faith Misconduct by State Courts—May Have Acquired a Measure of Constitutional Protection As a Result of Expansive Modern Conceptions of Due Process, Congress is Otherwise Free to Reduce the Availability of the Federal Habeas Remedy.

What are those "limited constitutional restrictions" that might prevent Congress from restricting or entirely eliminating the federal habeas remedy for state prisoners? As we argued in our Brief Amici Curiae in *Felker v. Turpin*, No. 95-8836, an historical view of the Suspension Clause, U.S. CONST., Art. I, § 9, Cl. 2, would suggest that the Clause has no application whatsoever to the statutory writ (which did not even come into existence until 1867). *See, e.g.*, Richard H. Fallon and Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1978) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.").

Even if the Court chooses to reject such a historical view, however, the Constitution cannot plausibly be held to protect the entire extent of the statutory writ as it has existed in the modern era. Such an extreme holding would ignore the historically

contingent nature of the Court's modern habeas expansion, which (as noted above) was motivated largely by the need—no longer apparent—to use the statutory writ to ensure that state courts recognized and respected the supremacy of federal constitutional law. Such a holding would also call into serious question many of this Court's recent precedents that have whittled away at the scope of the federal habeas remedy. *See, e.g., Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991).

Given our modern expansive conception of due process, the statutory writ has acquired a limited measure of constitutional protection (either by the Suspension Clause or by the Due Process Clause)—but that protection extends only as far as necessary to preserve the writ's vital role in fulfilling two core purposes that lie at the heart of our criminal justice system: (1) protecting innocent persons from unjust incarceration, and (2) deterring egregious or bad-faith misconduct by state courts in the enforcement of constitutional rights.

The first of these core purposes, the protection of the innocent, has long been recognized as a primary goal of habeas law, although it has only rarely been the driving force behind the Court's habeas decisions. *See, e.g., Herrera v. Collins*, 113 S.Ct. 853 (1993) (recognizing, at least in theory, a habeas petitioner's right to relief based on actual innocence, even in the absence of a constitutional claim of procedural trial error); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (establishing the "fundamental miscarriage of justice" exception to procedural default doctrine restricting habeas review); *Stone v. Powell*, 428 U.S. 465 (1976) (restricting habeas review of Fourth Amendment claims, which rarely implicate a petitioner's innocence); Friendly, *supra*, at 142.

The second core purpose, the deterrence of egregious or bad-faith misconduct by state courts in enforcing constitutional rights,

is no less important, *see, e.g., Mackey v. United States*, 401 U.S. 667, 675, 687 (1971) (Harlan, J., dissenting and concurring in the judgment) ("primary justification" of habeas is to provide an incentive for state courts to "toe the constitutional mark"), but can be accomplished in full measure through the adoption of a "reasonableness" standard of review for all federal habeas claims. *See* Hoffmann and Stuntz, *supra*, at 88-91. Such a "reasonableness" standard of review can reach, and thereby deter, all cases of egregious or bad-faith constitutional violations by state courts without extending the costly habeas remedy to other cases in which the state courts acted in good-faith reasonable reliance on federal law and in which there is thus no state-court "misconduct" to deter. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) (accomplishing similar result through the definition of "new law" for purposes of retroactivity analysis in habeas cases).

As we noted in our brief in *Felker*, the 1996 Act is completely consistent with a new model of federal habeas for state prisoners that seeks to restrict the habeas remedy to those rare situations where issuance of the writ is necessary to achieve one of the aforementioned goals. For example, amended 28 U.S.C. § 2254(d), the subject of the instant case, limits habeas relief to cases involving "a sufficiently high degree of conflict between the state decision and 'clearly established' federal law as determined by this Court—precisely the kinds of cases in which state courts need to receive a deterrence message." Brief Amici Curiae of Washington Legal Foundation and Justice for Surviving Victims, Inc., in Support of Respondent in *Felker v. Turpin*, No. 95-8836, at 22. Similarly, in amended 28 U.S.C. §§ 2254(e) and (f), the 1996 Act provides adequate opportunities for potentially innocent prisoners to obtain federal review of their constitutional claims, thus ensuring against fundamentally unjust incarcerations.

In these and other ways, the 1996 Act fulfills the twin goals of protecting innocent persons and deterring egregious or bad-faith misconduct by state courts. The 1996 Act therefore comports

with the Constitution, even in light of our modern expansive conceptions of due process, and honors society's continuing commitment to even-handed justice and procedural fairness in criminal proceedings.

II. UNDER THIS COURT'S TWO-PART *LANDGRAF* ANALYSIS, AMENDED 28 U.S.C. § 2254(d) SHOULD BE APPLIED TO PENDING HABEAS CASES; ALTHOUGH CONGRESS EXPRESSED NO CLEAR INTENT ON THE SUBJECT, THE NEW STATUTE MOST CLOSELY RESEMBLES A JURISDICTIONAL STATUTE, AND THUS ITS APPLICATION WOULD NOT CREATE A GENUINELY "RETROACTIVE" EFFECT.

A. Congress Did Not Clearly Express Its Intent Concerning the Application of Amended 28 U.S.C. § 2254(d) To Pending Habeas Cases.

Under the two-part retroactivity analysis laid out by the Court in *Landgraf v. USI Products*, 114 S.Ct. 1483 (1994), the first question that must be asked is if Congress has expressed, clearly and unambiguously, its intent as to whether or not the relevant section of the 1996 Act should apply to pending habeas cases. The answer to this question is "no."

The habeas reforms contained in the Antiterrorism and Effective Death Penalty Act of 1996 are divided into two separate sets of statutory provisions. The first set, contained in Sections 101 through 106 of the Act, applies to all federal habeas cases (and, with minor changes, to all collateral review of federal criminal cases under 28 U.S.C. § 2255). This is the portion of the statute that contains the specific provision challenged in the instant case, namely, the amendments to 28 U.S.C. § 2254(d).

The second set of statutory provisions, contained in Section 107 of the Act, applies only to state death-penalty cases, and then

only after the relevant state has adopted certain new procedures with respect to the appointment of competent counsel for death-row inmates in state post-conviction proceedings. After these conditions are satisfied, all death-penalty habeas cases in the relevant state are governed by the special rules of Section 107, which largely supplant the rules otherwise applicable to habeas cases.

In Section 107(c), Congress expressed its intent with respect to the application of the special Section 107 rules to pending death-penalty habeas cases: these special rules "shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1214, 1226. Congress expressed no such view, however, about the application of the general habeas reforms contained elsewhere in the 1996 Act to pending habeas cases.

What can be made of the fact that Congress expressed an intent to have Section 107 apply to pending death-penalty habeas cases, but expressed no intent as to whether the general reforms contained in Sections 101-106 should apply to pending habeas cases? Frankly, not much. This difference between the two parts of the statute is far too thin a reed to support Lindh's attempt to find Congressional intent by negative implication, especially given that there are reasonable competing explanations of Congress's decision to treat the two parts of the statute differently.

The most obvious explanation is that—unlike the general habeas reforms contained in Sections 101-106, which were capable of becoming effective as soon as the Act was enacted—the special Section 107 rules could not possibly become effective until sometime after the enactment date of the Act, because the states were first required to adopt certain new procedures in order to avail themselves of Section 107's special rules. Thus, with respect to Section 107, it was inevitable that someday the following questions would arise under Section 107: Once a particular state has finally complied with the new

procedures, and hence qualifies for Section 107 treatment, do the special Section 107 rules apply to all death-penalty habeas cases then pending, or only to those new cases filed after the state first qualifies for Section 107 treatment? And, if Section 107 applies to pending cases, does it apply to all such cases or only to those filed after the effective date of the 1996 Act? These retroactivity questions are much more difficult than most because they involve the added complication of delayed implementation of previously enacted statutory changes. Hence, Congress may well have chosen to express its intent concerning the application of the Section 107 amendments because it realized that those amendments would pose a special kind of retroactivity problem.

Seen in this light, Congress's expressed intent concerning Section 107 may well indicate that Congress had the *same* intent, not the opposite, with respect to the general habeas reforms in the Act. In any event, however, the fact that Section 107 poses such a special kind of retroactivity problem would seem to defeat any attempt to draw from it any negative implication concerning Sections 101-106.

A second plausible explanation for Congress's expression of intent in Section 107 is that those amendments implement a series of automatic stays of execution that Congress might have wished to make effective as quickly as possible, and in as many death-penalty habeas cases as possible (including all pending cases, as well as all newly filed ones), after a particular state finally adopts the required new procedures and qualifies for Section 107 treatment. The amendments contained in Sections 101-106 have no similar, automatic life-or-death consequences.

Finally, it is certainly plausible that Congress simply overlooked or ignored the chance to express its intent with respect to Sections 101-106. As acknowledged by Lindh, the substantive provisions in Section 107 originated in a different House of Congress, at a different time, than did the provisions contained in

Sections 101-106. *See* Brief of Petitioner, at 31 n.24. Moreover, the two parts of the statute are aimed at quite different goals—the Section 101-106 amendments apply to all habeas cases, and implement changes that almost uniformly restrict the scope of federal habeas, whereas the Section 107 amendments are designed specifically to deal with death-penalty cases and incorporate a significant amount of *quid pro quo* balancing of the respective interests of the state and the death-row inmate. In this complicated statutory context, it is not at all surprising that Congress dealt expressly with retroactivity in one part of the statute and not in the other part, and we should not strain to draw unjustifiable conclusions from the difference.

Nor should we draw similarly unjustifiable conclusions from another provision in Section 107 relied upon by Lindh: the new 28 U.S.C. § 2264(b), which incorporates subsections (a), (d), and (e) of Section 2254, and makes them applicable to Section 107 capital habeas cases. According to Lindh, the only possible reason for such a reference is that Congress sought to make those three subsections apply retroactively to pending capital habeas cases, suggesting to Lindh (by way of negative implication) that those three subsections (along with the remainder of Sections 101-106) must not apply on their own terms to all pending cases.

In his struggle to draw some sustenance from Section 107, however, Lindh glosses over a much more obvious interpretation of the reference to Section 2254(a), (d), and (e) in the new Section 2264(b)—namely, that the three subsections cited are the only ones in Section 2254 that apply to capital habeas cases otherwise governed by the special Section 107 rules. This is the most plausible reading of Section 2264(b) and does no violence either to the structure of federal habeas or to the interests of the states.

Lindh notes that such a reading would eliminate the exhaustion requirement in Section 107 cases and claims that this result could

not be what Congress intended. But, it must be remembered that Section 107 applies only to capital habeas cases. In capital cases, exhaustion (which is one of the Section 2254 provisions that is not referenced in the new Section 2264(b)) generally works to the advantage of the habeas petitioner, who seeks delay above all else, and to the disadvantage of the State. This is one reason many states sought to have this Court, in *Granberry v. Greer*, 481 U.S. 129 (1987), recognize a state's right to waive the habeas exhaustion requirement, and it is surely one reason that Section 107 does not require exhaustion in capital habeas cases.

Indeed, in the overwhelming majority of capital habeas cases that will someday be governed by the special Section 107 rules (leaving to one side those exceedingly rare cases of newly discovered evidence offered by Lindh as his best evidence of an illogic in the lower court's construction of the new statute), the only provisions in Section 2254 that a State would ever likely seek to assert are the same three provisions that are referenced in the new Section 2264(b): subsections (a), (d), and (e). It seems probable that Congress incorporated these three subsections because they are the only subsections meant to apply to Section 107 capital cases. There is no basis for concluding that the reference to those provisions has anything to do with retroactivity.

B. The 1996 Amendments to Section 2254(d), Which Create a New Standard of Review for Federal Habeas Cases Filed by State Prisoners, Do Not Impair Any "Vested Rights" But Merely Reallocate Decision-making Authority to Enforce Those Rights Between The State And The Lower Federal Courts, and Thus Their Application to Pending Habeas Cases Would Not Create a Genuinely "Retroactive" Effect.

Because Congress did not clearly and unambiguously express its intent concerning the application of amended 28 U.S.C. § 2254(d) to pending habeas cases, the analysis under *Landgraf*

must proceed to the question of whether such application would be genuinely "retroactive" in effect (and hence presumptively improper) or not (and hence presumptively permitted). This final step in the *Landgraf* analysis depends, in turn, on whether the challenged new statutory provision "attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S.Ct., at 1499. According to this Court,

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, *see Republic Nat'l Bank v. United States*, 506 U.S. 80 (1992) (Thomas, J., concurring in part and concurring in the judgment), or upsets expectations based in prior law. . . . The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," *see Danforth v. Groton Water Co.*, 59 N.E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 114 S.Ct., at 1499.

Although the *Landgraf* case cited and extensively discussed dozens of prior retroactivity decisions, we believe that the instant case presents the Court with a situation unlike any other it has previously encountered in the context of retroactivity law. On the one hand, this case resembles some prior cases in which a cause of action based on past conduct was newly created, extinguished, or significantly modified by a new statute. Such cases generally result in prospective-only application, on the

ground that applying such a new statute to past conduct would unfairly create a "new disability," *see Landgraf*, 114 S.Ct., at 1507, and would "impose new burdens on persons after the fact," *see id.* at 1500; *see also*, cases cited in *Landgraf*, 114 S.Ct., at 1500 n.25, and at 1507 n.36. On the other hand, this case also resembles some prior cases involving new procedural rules. *See, e.g.*, cases cited in *Landgraf*, 114 S.Ct., at 1502 n.28. Such situations generally result in the application of the new rule to pending cases, on the ground that parties to a pending case have "diminished reliance interests" in procedural rules. *See id.*, 114 S.Ct., at 1502. Moreover, the present case resembles prior cases involving changes in the availability of prospective relief, *see, e.g.*, cases cited in *Landgraf*, 114 S.Ct., at 1501, and are, likewise, generally applied to pending cases on the ground that parties have no "vested rights" to prospective relief. *See Landgraf*, 114 S.Ct., at 1501.

We believe that, despite these similarities, the instant case is *sui generis*, and does not fit squarely into any of the categories identified by the Court in prior retroactivity cases. For example, the "cause of action" cases so heavily relied upon by Lindh are inapposite because—although amended 28 U.S.C. § 2254(d) substantially alters the federal habeas "cause of action"—it leaves wholly untouched an equivalent "cause of action" in the state courts, namely, the direct appeal (along with the accompanying right to seek *certiorari* review of the state-court judgment in this Court). Although Lindh argues strenuously that the prior federal habeas "cause of action" was "qualitatively superior, in virtually every case," to other available remedies for constitutional violations, *see* Brief of Petitioner, at 17 & 19, such a claim seems either hyperbolic or hopelessly archaic in light of such cases as *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); and, especially, *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny—each of which served to align federal habeas law more closely with the procedural rules applicable in the analogous

state-court criminal proceedings. Indeed, the state-court version of the same "cause of action" modified by amended 28 U.S.C. § 2254(d) is, in some important respects, even more favorable to a state prisoner than was the previous federal habeas "cause of action." *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976). On balance, it appears that Lindh's strong preference for the previous federal habeas "cause of action" may be based on the outdated belief that there must be a constitutionally-based "right" to a "federal forum" for all federal constitutional claims, beyond the obvious (and unaltered) right to seek *certiorari* from this Court. *See* Hoffmann and Stuntz, *supra*, at 81 & n.50.

What makes the instant case truly unique, among the myriad retroactivity cases previously decided by the Court, is that the new statutory provision challenged here—without making any changes at all in the federal constitutional rules of criminal procedure that form the substantive basis for both state-court and federal habeas "causes of action"—serves to reallocate decision-making authority in the enforcement of those rights between the state and lower federal courts, much like a jurisdictional statute might operate in a unitary court system. The clear purpose of the amendments to 28 U.S.C. § 2254(d) is to place more responsibility in the hands of the state courts, in adjudicating claims of constitutional violations in state criminal cases, by requiring federal habeas courts to forego the remedy of issuing writs of habeas unless the new "reasonableness" standard of review of Section 2254(d) can be met. This change in federal habeas law does not, in any way, vitiate a habeas petitioner's constitutional rights. Nor does it, in any way, make it less likely that a state prisoner will obtain a remedy for a constitutional violation from the state courts, or from this Court on writ of *certiorari*. If anything, we might reasonably expect (as Congress certainly seems to expect) that this change in federal habeas law, by placing greater trust in the state courts, will make it even more likely that those state courts will vigorously protect the constitutional rights of their citizens.

For these reasons, although we agree with Lindh that amended 28 U.S.C. § 2254(d) is non-jurisdictional in nature, for purposes of completing *Landgraf*'s retroactivity analysis, the new statute should be treated as if it were a jurisdictional statute. That is, it should generally be applied to pending habeas cases. Like a jurisdictional statute, the statute challenged here "takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 114 S.Ct., at 1502 (citing *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). In the words of this Court, "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 114 S.Ct., at 1502 (citing *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80 (Thomas, J., concurring)). Such an outcome would also flow naturally from the premise, reiterated in *Landgraf*, that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Landgraf*, 114 S.Ct., at 1486 (citing *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

The only remaining issue is whether, because amended 28 U.S.C. § 2254(d) is not, in fact, a jurisdictional statute, the Court should continue to inquire into any possible "reliance interests," *see Landgraf*, 114 S.Ct., at 1502, as a means of assessing the potential unfairness to some litigants of applying amended 28 U.S.C. § 2254(d) to all pending habeas cases, including those (like Lindh's) in which the habeas petition was filed before the new statute's effective date. In other words, should the Court consider exempting certain narrow categories of habeas petitioners who were most likely to have acted in reasonable reliance on the prior allocation of respective state- and federal-court responsibility for enforcing federal constitutional rights, from the otherwise general application of the new statutory provision to pending habeas cases? Such a fact-sensitive approach is well within the Court's sound discretion in

interpreting and applying *Landgraf*'s retroactivity analysis. Given the *sui generis* nature of the retroactivity controversy posed by the instant case, and the limited number of persons likely to be similarly situated to Lindh, we express no view about the question of whether Lindh would satisfy the requirements of demonstrating such a "reliance interest."

CONCLUSION

For the reasons stated herein, as well as those set forth in the Brief for Respondent, the Court should affirm the judgment of the Seventh Circuit. However, even if the Court chooses to exempt Lindh from the application of the challenged statutory provision based on fact-specific "reliance interests," it should find that amended 28 U.S.C. § 2254(d) is generally applicable to pending habeas cases.

Respectfully submitted,

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